



## **DEPARTMENT OF THE INTERIOR**

### **National Indian Gaming Commission**

#### **25 CFR Part 518**

#### **RIN 3141-AA72**

### **Self-Regulation of Class II Gaming**

**AGENCY:** National Indian Gaming Commission.

**ACTION:** Final rule.

**SUMMARY:** The National Indian Gaming Commission (NIGC) is amending its regulations regarding self-regulation of Class II gaming under the Indian Gaming Regulatory Act. The amendment revises the regulations to address an ambiguity in the petitioning process and clarifies the Office of Self-Regulation's (OSR) role once the Commission issues a certificate. Notably, the amendment: Clarifies the NIGC may issue a final decision on issuing a certificate within 30 days instead of after 30 days; removes the requirement that the director of the OSR must be a Commissioner; enumerates the OSR is the correct party to receive notifications of material changes from self-regulated tribes; expands the deadline for tribes to report material changes to the OSR from three business days to 10 business days; clarifies the OSR will be the office to make any recommendations to revoke a certificate of self-regulation before the Commission; and clarifies that, in any revocation proceeding, the OSR has the burden to show just cause for the revocation and carry that burden by a preponderance of the evidence.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Michael Hoenig, National Indian Gaming Commission; 1849 C Street NW, MS 1621, Washington, DC 20240. Telephone: (202) 632-7003.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (NIGC or Commission) and sets out a comprehensive framework for the regulation of gaming on Indian lands.

On January 31, 2012, the Commission published a notice of proposed rulemaking to promulgate part 518, the procedures controlling self-regulation. 77 FR 4714 (Jan. 31, 2012). Once promulgated, part 518 established the procedures for the Commission and the OSR to, among other things, receive, evaluate, recommend, issue, deny, or revoke a certificate of self-regulation. On September 1, 2013, after initial publication, the Commission enacted minor revisions to part 518 to amend certain timelines and an incorrect section heading and reference to IGRA. 78 FR 37114 (Sept. 1, 2013).

**II. Development of the Proposed Rule**

On June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the procedures controlling self-regulation. Prior to consultation, the Commission released proposed discussion drafts of the regulations for review. The proposed amendments are intended to improve the Agency's efficiency in evaluating petitions for self-regulation, reduce the time it takes to obtain a certificate of self-regulation, and clarify the Office of Self-Regulation's functions.

The Commission held two virtual consultation sessions in September and one virtual consultation in October of 2021 to receive tribal input on any proposed changes. After considering the comments received from the public and through tribal consultations, the Commission published a notice of proposed rulemaking on April 7, 2022, 87 FR 20351. The notice of proposed rulemaking indicated that comments were due on or before June 6, 2022. On June 16, 2022, 87 FR 36280, the NIGC announced the reopening of the comment period until June 23, 2022.

The Commission reviewed all of the public's comments and now adopts these changes, which it believes will improve the self-regulation process.

### **III. Review of Public Comments**

The Commission received the following comments in response to the notice of proposed rulemaking.

**Comment:** Several commenters approved of the change that clarified the Commission may issue a final determination for a certificate of self-regulation within 30 days if no hearing is requested, as the prior language was ambiguous and potentially left open an indefinite time period for a determination.

**Response:** The Commission appreciates the comment and has left the language in the final rule.

**Comment:** Several commenters approved of the change from three to ten business days for tribes to notify the OSR of material changes.

**Response:** The Commission appreciates the comment and has left the language in the final rule.

**Comment:** Several commenters approved that placing the burden of proof on the OSR in revocation hearings.

**Response:** The Commission appreciates these comments and has left the language in the final rule.

**Comment:** A commenter stated that procedural questions were left unanswered for § 518.7(f), specifically (1) to whom should the notice be directed, (2) what restrictions exist to who may send a notice, and (3) the contents of the notice and what it must include.

**Response:** The Commission appreciates the comment and intends to provide clarity on these and other process questions. It does not wish, however, to codify a process that may change in the future. The Commission intends to publish guidance for administrative and procedural matters on its website where it can be updated as needed.

**Comment:** Numerous commenters expressed concern with the reporting requirements in § 518.11 and commented that there were unanswered questions as to what needs to be reported.

**Response:** The Commission appreciates the comments, and notes that the only proposed change to the rule pertained to the office the Tribe or Tribal Gaming Regulatory Authority reports such information. The Commission believes the scope of what needs to be detailed is sufficiently covered by the reference to § 518.5, which does specify criteria that will be considered by the Commission when deciding to grant a certificate of self-regulation, as well as the examples given in § 518.11. To the extent that additional guidance or detail is needed, the Commission will include such information in future bulletins.

**Comment:** Several commenters expressed concern that if a Commissioner is appointed the head of the OSR they would be the proponent of any case to revoke a certificate before the Commission and also voting on the revocation. The commenters stated that this would create an insurmountable conflict of interest.

**Response:** The Commission has changed the rule to no longer require that a Commissioner serve as the head of the OSR. That being said, there is nothing to prohibit the Commission from appointing a Commissioner to lead the office, and the Commission disagrees with the commenter's assertion that a Commissioner serving as head of the OSR would create a conflict of interest. It is not a violation of due process for the Commissioners to serve both investigatory and adjudicatory functions. The United State Supreme Court held as much in the case *Withrow v.*

*Larkin*, 421 U.S. 35, 51-52 (1975), following the cases that rejected the idea that the combination (of) judging (and) investigating functions is a denial of due process. The Court further stated there is a presumption of honesty and integrity in those serving as adjudicators. Moreover, the NIGC is familiar with such a structure and the dual role of investigator and adjudicator comes from IGRA itself. Section 2706 of IGRA tasks the Commission with investigatory and inspection powers, while section 2713 requires the Commission to hear any appeals of a civil fine or closure order issues by the Chairman. The Commission has long worked under such a structure. For example, the Chairman makes a determination on a gaming ordinance and also sits on the panel if it is appealed. And although there is a presumption of fairness, the NIGC nevertheless has policies and procedures in place to ensure a fair decision on all appeals and investigations.

**Comment:** A commenter requested that if a commissioner is appointed as Director of OSR that they recuse themselves from participating as a Commissioner of NIGC in revocation hearings for due process concerns.

**Response:** The Commission declines to adopt this suggestion for the same reason as above.

**Comment:** Several comments were outside the scope of the rulemaking and related generally to the self-regulation process, the lack of guidance and the inability of more tribes to participate in the self-regulation process.

**Response:** The Commission appreciates these comments and will take them into consideration for future guidance or amendments to the rule.

#### **IV. Regulatory Matters**

##### *Regulatory Flexibility Act*

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian tribes are not considered small entities for the purposes of the Regulatory Flexibility Act.

##### *Small Business Regulatory Enforcement Fairness Act*

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of \$100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions. Nor will the rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises to compete with foreign based enterprises.

#### *Unfunded Mandate Reform Act*

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

#### *Takings*

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

#### *Civil Justice Reform*

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of section 3(a) and 3(b)(2) of the order.

#### *National Environmental Policy Act*

The Commission has determined that the rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

#### *Paperwork Reduction Act*

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501 et seq. and assigned OMB Control Number 3141–0003.

### *Tribal Consultation*

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (E.O.) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy published July 15, 2013. The NIGC consultation policy specifies that it will consult with tribes on Commission Actions with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to the ability of an Indian tribe to regulate its Indian gaming; an Indian tribe’s formal relationship with the Commission; or the consideration of the Commission’s trust responsibilities to Indian tribes.

Pursuant to this policy, on June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on a number of topics, including proposed changes to the self-regulation process.

### **List of Subjects in 25 CFR Part 518**

Gambling, Indian--lands, Indian--tribal government, Reporting and recordkeeping requirements.

Therefore, for reasons stated in the preamble, 25 CFR part 518 is amended as follows:

### **PART 518—SELF-REGULATION OF CLASS II GAMING**

1. The authority citation for part 518 is revised to read as follows:

Authority: 25 U.S.C. 2706(b)(10); 25 U.S.C. 2710(c).

2. Revise § 518.2 to read as follows:

**§ 518.2 Who will administer the self-regulation program for the Commission?**

The self-regulation program will be administered by the Office of Self-Regulation. The Chair shall appoint a Director to administer the Office of Self-Regulation.

3. Revise § 518.5(b) introductory text to read as follows:

**§ 518.5 What criteria must a tribe meet to receive a certificate of self-regulation?**

\* \* \* \* \*

(b) A tribe may illustrate that it has met the criteria listed in paragraph (a) of this section by addressing factors such as those listed in paragraphs (b)(1) through (9) of this section. The list of factors is not all-inclusive; other factors not listed here may also be addressed and considered.

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4. Revise § 518.7(f) to read as follows:

**§ 518.7 What process will the Commission use to review and certify petitions?**

\* \* \* \* \*

(f) The Commission shall issue a final determination within 30 days after issuance of its preliminary findings if the tribe has informed the Commission in writing that the tribe does not request a hearing or within 30 days after the conclusion of a hearing, if one is held. The decision of the Commission to approve or deny a petition shall be a final agency action.

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5. Revise § 518.11 to read as follows:

**§ 518.11 Does a tribe that holds a certificate of self-regulation have a continuing duty to advise the Commission of any additional information?**

Yes. A tribe that holds a certificate of self-regulation has a continuing duty to advise the Office of Self-Regulation within 10 business days of any changes in circumstances that are material to



the approval criteria in § 518.5 and may reasonably cause the Commission to review and revoke the tribe's certificate of self-regulation. Failure to do so is grounds for revocation of a certificate of self-regulation. Such circumstances may include, but are not limited to, a change of primary regulatory official; financial instability; or any other factors that are material to the decision to grant a certificate of self-regulation.

4. Revise §§ 518.13 and 518.14 to read as follows:

**§ 518.13 When may the Commission revoke a certificate of self-regulation?**

If the Office of Self-Regulation determines that the tribe no longer meets or did not comply with the eligibility criteria of § 518.3, the approval criteria of § 518.5, the requirements of § 518.10, or the requirements of § 518.11, the Office of Self-Regulation shall prepare a written recommendation to the Commission and deliver a copy of the recommendation to the tribe. The Office of Self-Regulation's recommendation shall state the reasons for the recommendation and shall advise the tribe of its right to a hearing under part 584 of this chapter or right to appeal under part 585 of this chapter. The Commission may, after an opportunity for a hearing, revoke a certificate of self-regulation by a majority vote of its members if it determines that the tribe no longer meets the eligibility criteria of § 518.3, the approval criteria of § 518.5, the requirements of § 518.10 or the requirements of § 518.11.

**§ 518.14 May a tribe request a hearing on the Commission's proposal to revoke its certificate of self-regulation?**

Yes. A tribe may request a hearing regarding the Office of Self-Regulation's recommendation that the Commission revoke a certificate of self-regulation. Such a request shall be filed with the Commission pursuant to part 584 of this chapter. Failure to request a hearing within the time provided by part 584 of this chapter shall constitute a waiver of the right to a hearing. At any hearing where the Commission considers revoking a certificate, the Office of Self-Regulation

bears the burden of proof to support its recommendation by a preponderance of the evidence.

The decision to revoke a certificate is a final agency action and is appealable to Federal District Court pursuant to 25 U.S.C. 2714.

Dated: September 27, 2022.

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E. Sequoyah Simermeyer,  
Chairman

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Jeannie Hovland  
Vice Chair

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